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No. 97-791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT P. BURCH,

Petitioner,

vs.

THE COCA-COLA COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE, THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE AND THE ASSOCIATION OF SUBSTANCE ABUSE PROGRAMS OF TEXAS, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONER

ELLEN M. WEBER
Counsel of Record
SALLY FRIEDMAN
PAUL N. SAMUELS
LEGAL ACTION CENTER
236 Massachusetts Avenue, N.E.
Suite 505
Washington, D.C. 20002
(202) 544-5478

28 pp

MOTION OF THE AMERICAN SOCIETY OF ADDICTION MEDICINE, THE NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE AND THE ASSOCIATION OF SUBSTANCE ABUSE PROGRAMS OF TEXAS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37(2)(b) of the Rules of the Supreme Court of the United States, the American Society of Addiction Medicine, the National Council on Alcoholism and Drug Dependence and the Association of Substance Abuse Programs of Texas respectfully request leave to file the accompanying brief as *amici curiae* in support of Petitioner Robert P. Burch's request for a writ of certiorari. Respondent Coca-Cola, Inc. has withheld consent for the filing of this brief. Petitioner Robert Burch has consented.

Amici, which are described fully in the Interest of *Amici Curiae*, are dedicated to preventing and treating the disease at issue in this case: alcoholism. Their members are among the Nation's experts in diagnosing, treating and conducting scientific and policy research about this disease. The Fifth Circuit's decision will hinder their efforts to prevent and treat alcoholism and improve clinical, judicial and public understanding of alcoholism.

Amici can provide valuable assistance to the Court. The key issue in this case is whether the Fifth Circuit has applied the disability standard of the Americans with Disabilities Act (ADA) correctly to Mr. Burch, whose disability is alcoholism. This determination must be grounded in medical knowledge and science, which all three organizations are persuaded the Fifth Circuit has ignored. Granting *amici* leave to participate will enable them to present relevant scientific information that is necessary to understand why the Fifth Circuit's decision is wrong as a matter of science and law.

Amici are also able to apprise the Court of the far-reaching implications of the Fifth Circuit's decision, which conflicts with several other Circuits' decisions concerning alcoholism and other disabilities under the ADA, and would reverse twenty years of progress made possible by the ADA and the federal Rehabilitation Act. The legal standard adopted by the Fifth Circuit will eviscerate the ADA's protection of qualified individuals with alcohol dependence. This will hamper our Nation's efforts to treat alcohol dependence and to ensure that those who have been treated retain or find employment, which is essential to maintain sobriety. *Amici* believe that information about the substantial human and social costs that would flow from the decision below will assist the Court in deciding whether to grant certiorari.

Accordingly, the American Society of Addiction Medicine, the National Council on Alcoholism and Drug Dependence, and the Association of Substance Abuse Programs of Texas urge the Court to grant them leave to present their views.

Respectfully submitted,

ELLEN M. WEBER*
SALLY FRIEDMAN
PAUL N. SAMUELS
LEGAL ACTION CENTER
236 Massachusetts Ave, N.E., Suite 505
Washington, D.C. 20002
(202) 544-5478
Fax: (202) 544-5712

Attorneys for *Amici Curiae*

**Counsel of Record*

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The American Society of Addiction Medicine, the National Council on Alcoholism and Drug Dependence, and the Association of Substance Abuse Programs of Texas respectfully submit this brief *amici curiae* in support of Petitioner's

[1] No party participated in the drafting of this brief, and counsel for *amici* funded it in total.

request for a writ of certiorari, contingent on the granting of the accompanying motion for leave, pursuant to Rule 37(2)(b). Petitioner, Robert Burch, has consented to the filing of this brief. Respondent, Coca-Cola Company, has withheld consent.

INTEREST OF *AMICI CURIAE*

This case is about whether individuals with alcohol dependence are protected against discrimination under the Americans with Disabilities Act (ADA). It began as a classic case of discrimination when Coca-Cola terminated a valued employee who took medical leave to get treatment for his alcoholism. The Fifth Circuit, which held, in part, that Mr. Burch is not disabled under the ADA, has transformed the case into an unprecedented decision that establishes incorrect legal standards and promotes a fundamentally flawed and biased understanding of the disease of alcoholism. If permitted to stand, the decision, even in its narrowest application, will eviscerate the ADA's protection of qualified individuals with alcohol problems. It could also undo workplace practices that help individuals get the care they need and remain employed and reduce the workplace, health and social costs resulting from untreated alcoholism. If applied generally, the decision will constrict the ADA's protection of all individuals with disabilities.

The American Society of Addiction Medicine (ASAM), the National Council on Alcoholism and Drug Dependence (NCADD), and the Association of Substance Abuse Programs of Texas and their members are dedicated to preventing and treating one of the Nation's most serious and costly public health problems: alcohol dependence. The anti-discrimination protections of the ADA are critical to the fight against alcoholism.

ASAM, founded in 1954, is an international association of 3,200 physicians in a wide range of medical specialties. ASAM is dedicated to improving the treatment of alcoholism and other addictions, through research, prevention, and education of the medical community and the public. ASAM is a

delegate in the American Medical Association's House of Delegates, and, in June 1990, the AMA's Board of Trustees designated addiction medicine as a practice specialty.

NCADD is a voluntary health organization with a nationwide network of affiliates. NCADD advocates for prevention, intervention, research and treatment of alcoholism and drug dependence, and pioneered efforts to establish employee assistance programs that enable employers and employees to address and resolve work-related problems stemming from these diseases. NCADD and its affiliates work to eradicate the stigma of alcoholism and educate the public that alcoholism is a complex medical condition that can and must be treated.

The Association of Substance Abuse Programs of Texas represents fifty non-profit substance abuse service organizations. Its purpose is to strengthen the quality and scope of substance abuse prevention, education, intervention and treatment for the people of Texas. The Association's members treat thousands of individuals for alcoholism each year and help them to maintain their sobriety and retain or find employment.

All three organizations have a keen interest in ensuring that the courts understand the disease of alcohol dependence and apply medical and scientific knowledge appropriately in resolving discrimination suits. As discussed below, the clinical conditions that would satisfy the Fifth Circuit's standard for finding a disability under the ADA exist in only a tiny segment of people diagnosed with alcohol dependence and never appear in those who are employed or employable. Accordingly, these organizations are very concerned about the establishment of a legal standard that is based on a flawed understanding of the disease and would exclude virtually all persons with alcohol dependence from the protections of the ADA. The Fifth Circuit's standard would deter employees from coming forward and entering treatment for fear of losing their livelihood, drive the problem underground, and increase costs to employers.

The legal protections afforded individuals with alcohol problems are important because the disease reaches into almost every corner of the American workplace. An estimated 13.8 million Americans, the vast majority of whom are employed, have alcohol problems. Approximately 8.1 million of these are alcohol dependent, and the remainder fit a diagnosis of alcohol abuse.[2] A national survey that examined the prevalence of alcohol abuse and dependence among workers in 500 occupations found that over ten percent of American workers have a problem with alcohol.[3]

Untreated alcohol abuse and dependence cost the United States approximately $98.6 billion in 1990.[4] Approximately 72 percent of these costs are associated with lost employment and reduced productivity resulting from alcohol-related death and illness.[5] Absenteeism among employees with alcoholism or drinking problems is 3.8 to 8.3 times greater than normal.[6] And the health care costs for individuals with alcoholism are

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[2] Bridget F. Grant et al., "Prevalence of DSM-IV-R Alcohol Abuse and Dependence: United States, 1992," *Alcohol Health & Research World*, Vol. 18, No. 3, 243, 245 (1994). The diagnosis of alcohol disorders is made most commonly by using the diagnostic criteria set out in the American Psychiatric Associations' *Diagnostic and Statistical Manual of Mental Disorders* (DSM). The criteria for distinguishing alcohol abuse from alcohol dependence are described *infra* at p. 9, 10, and 12. Alcohol dependence is synonymous with alcoholism.

[3] Frederick S. Stinson et al., "Prevalence of DSM-III-R Alcohol Abuse and/or Dependence Among Selected Occupations, United States 1988," *Alcohol Health & Research World*, Vol. 16, No. 2, 165, 167-71 (1992).

[4] Dorothy P. Rice, Sc.D., "The Economic Cost of Alcohol Abuse and Alcohol Dependence: 1990," *Alcohol Health & Research World*, Vol. 17, No. 1, 10 (1993).

[5] Stinson et al., *supra*, n. 2, at 172.

[6] U.S. Department of Labor, *What Works: Workplaces Without Drugs*, 3 (August 1990).

roughly twice as high as that for those who do not have this disease.[7]

Treatment dramatically reduces alcohol-related health care and other workplace costs. A study of over 3,000 individuals who were treated for alcoholism revealed that their health care costs dropped by 23%, on average, after treatment. The study also found that over a 14-year period, the health care costs of persons who received alcoholism treatment were 24% lower than were the health costs of those who were not treated for their alcoholism. Many employers, particularly large corporations, have implemented Employee Assistance Programs to reduce workplace problems associated with untreated alcoholism and to treat, rather than terminate, employees with such problems. Many have documented the value of providing treatment.[8]

The Fifth Circuit's decision shatters the legal foundation that has made these strides possible.

STATEMENT OF THE CASE

A. Facts

Amici adopt the factual statement in Petitioner's Brief and highlight several additional facts. Mr. Burch sought inpatient alcoholism treatment after being unable, even with the assistance of outpatient counseling, to control his drinking for a year and a half. Mr. Burch's drinking affected him both on and off the job. He testified that when he became intoxicated,

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[7] *Id.* at 149.

[8] For example, employees of the Philadelphia Police Department who received treatment reduced their sick days by an average of 38% and their injured days by 62%. Oldsmobile's Lansing, Michigan plant saw the following results in the year after its employees with alcoholism received treatment: lost work hours declined by 49%; health care costs declined by 29%; leaves declined by 56%; grievances declined by 78%; disciplinary problems declined by 63%; and accidents declined by 82%. Drusilla Campbell & Marilyn Graham, *Drugs and Alcohol in the Workplace: A Guide for Managers*, 9 (New York: Facts on File Publications, 1988).

he suffered blackouts and insomnia and lost his ability to walk, talk, think and function. While he did not drink during work hours, his drinking affected his memory and caused him to avoid interaction with co-workers in the morning. Indeed, Mr. Burch decided to enter alcoholism treatment the day after an incident at a company dinner, which opened his eyes to the seriousness of his problem. He testified that he realized that his drinking was affecting his personal life and, in his words, "the last thing I wanted it to do was have it affect my business life." (TR. 224) He sought treatment before he was informed that his conduct at the company function was being investigated.

Mr. Burch's treating physician at Charter Hospital diagnosed him as suffering from "alcohol withdrawal syndrome, alcohol dependence and possibly depression." As such, according to Dr. Nace, alcohol-induced changes to the brain had caused Mr. Burch to permanently lose control over his ability to regulate the amount of alcohol he drank, which resulted in increasingly more interpersonal conflicts. (TR. 665-66) No other medical evidence was presented at trial to refute Dr. Nace's diagnosis or his opinion that Mr. Burch fit the definition of "disabled" under the ADA.

B. The Fifth Circuit's Decision

The Fifth Circuit reversed the jury verdict for Mr. Burch. The Court held that he did not meet the ADA definition of disability, as he did not suffer from an impairment that substantially limited a major life activity, did not have a record of such an impairment, and was not perceived as having such an impairment. The Court found that while Mr. Burch's alcoholism may be permanent, it did not reach the level of severity to *substantially* limit any major life activity. The Court reasoned that Mr. Burch's condition, which it characterized as inebriation that was temporarily incapacitating, was no different than that of an overindulging social drinker who experienced impaired senses, dulled reactions, restless sleep and an unpleasant morning after drinking. Finding no difference between Mr. Burch and social drinkers, the Court went on to

identify the physical and mental conditions that an individual with alcohol dependence would have to present to satisfy the definition of disability: "alcoholism-induced inebriation that permanently altered his gait, his ability to speak properly, his memory when sober, or produced long-term insomnia." The Court cited no medical evidence to support its formulation of Mr. Burch's impairment or its list of the conditions that would render an alcoholic disabled under the ADA. It also provided no legal support for its disability standard, which requires individuals with alcoholism, at a minimum, to prove additional, permanently impairing conditions to be covered under the ADA.

The Court also held that Burch had not stated a reasonable accommodation claim because he had not demonstrated that the major life activity of "work" was substantially limited, which, according to the Court, is necessary for a such claim. Again citing no support for this legal standard, the Court reasoned that if work is not affected there is nothing to be accommodated. Only with claims of intentional discrimination, according to the Court, can an aggrieved employee rely on a major life activity other than work.

Finally, the Court held that Mr. Burch's request for a leave of absence to obtain treatment and return to work upon completion is not a "cognizable, reasonable accommodation." The Court reasoned that, because Coca-Cola permitted him to enter treatment and paid him during his absence, the only thing Mr. Burch had requested was the ability to return to his job. The Court found that, as a matter of law, Coca-Cola's refusal to permit Mr. Burch to return after his leave of absence can only be challenged as a discriminatory discharge, not as a failure to provide a reasonable accommodation.

SUMMARY OF ARGUMENT

The Fifth Circuit's unprecedented holding that Mr. Burch, an individual diagnosed with alcohol dependence, is not disabled under the ADA is based on several errors of law. First, the Court has erroneously misconstrued Mr. Burch's impairment as one manifestation of alcohol dependence —

inebriation — rather than the underlying condition. Second, in determining whether Mr. Burch's impairment is "substantially limiting," it has required that the limitations resulting from his impairment be both permanent and of such severity that secondary physical and mental conditions exist (in addition to his alcoholism). The Court's formulation amounts to a legal standard that excludes all individuals with alcoholism from the protection of the ADA; one must also have another secondary disability caused by the primary disability, alcoholism. It conflicts with other Circuit Court decisions that have analyzed the legal standard for disability in cases relating to alcohol dependence as well as other impairments.

The Court has also established an incorrect standard for stating a reasonable accommodation claim under the ADA by requiring proof that a disability substantially limits the major life activity of work rather than any other major life activity. Finally, the Court has misconstrued the accommodation of a leave of absence and has erroneously ruled that the refusal to permit an employee to return after a leave can only be challenged as intentional discrimination, not a violation of the reasonable accommodation requirement.

ARGUMENT

I. THE FIFTH CIRCUIT'S LEGAL STANDARD FOR "DISABILITY" CONFLICTS WITH OTHER CIRCUITS AND IS INCONSISTENT WITH THE ADA'S TITLE I REGULATIONS

A. The Fifth Circuit Erred In Identifying Mr. Burch's Impairment As One Manifestation Of Alcoholism, Not The Underlying Condition.

The Fifth Circuit made several legal errors in holding that Mr. Burch does not meet the ADA definition of "disability" (42 U.S.C. § 12102(2)). First, the Court misconstrued the very nature of Mr. Burch's disability by focusing on the most apparent manifestation of alcoholism — inebriation — and recasting his impairment as nothing more than temporary

episodes of inebriation. Other Circuit Courts have explicitly rejected this approach.

For example, the Sixth Circuit in *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1997), reversed the district court's ruling that an employee who had a bladder condition that caused intermittent bladder infections was not an individual with a disability. The Sixth Circuit found that the lower court had erred in analyzing whether a disability existed because, "[i]nstead of considering whether plaintiff's bladder condition constitutes a disability, the District Court considered only whether her bladder infections constitute a disability." *Id.* at 844. Since the bladder infections are a characteristic manifestation of the particular impairment, they are a part of the underlying impairment and should not be considered separately. The Sixth Circuit remanded the case for a determination of whether the bladder condition substantially limited plaintiff's major life activities. Similarly, in *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995), the Seventh Circuit held that an employer had a duty to reasonably accommodate plaintiff's pressure ulcers because they were a part of her disability of paralysis. The Court rejected defendant's assertion that because the pressure ulcers were intermittent and episodic, and, thus, outside the definition of disability, they did not have to be accommodated. The Court noted that "[o]ften the disabling aspect of a disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment." *Id.* at 544.

In this case, the Fifth Circuit missed the forest — an unrebutted medical diagnosis of alcohol dependence — for the trees. A diagnosis of alcohol dependence means that Mr. Burch had a pattern of drinking — not singular and temporary episodes — that satisfied at least three of the following criteria:

> (1) tolerance, which is the need for markedly increased amounts of alcohol to achieve intoxication or the desired effect, or diminished effect with the continued use of the same amount of alcohol;

> (2) withdrawal, exhibited by withdrawal symptoms and consuming alcohol to avoid or relieve such symptoms;
>
> (3) impaired control as exhibited by the persistent desire or one or more unsuccessful efforts to control drinking and drinking larger amounts or over a longer period of time than intended;
>
> (4) neglect of important social, occupational, or recreational activities because of drinking;
>
> (5) a great deal of time devoted to obtaining alcohol, drinking and recovering from its effects;
>
> (6) inability to fulfill role obligations at work, school or home;
>
> (7) hazardous use of alcohol;
>
> (8) continued drinking despite knowledge of having persistent or recurring social, psychological or physical problems caused by alcohol use; and
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> (9) some symptoms have persisted for at least one month or have occurred repeatedly over a longer period.[9]

It is this constellation of symptoms that must be examined to determine whether Mr. Burch was substantially limited in any major life activity.

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[9] National Institute on Alcohol Abuse and Alcoholism, *Alcohol Alert*, No. 30, Washington, D.C. (1987), citing the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised* (DSM-III-R), which was the standard diagnostic tool at the time of Mr. Burch's diagnosis.

B. The Fifth Circuit's Legal Standard For "Substantially Limits" Is Not Supported By The Law Or Title I Regulations.

The regulatory definition of "substantially limits"[10] requires an examination of the extent, duration and impact of the impairment. EEOC Compliance Manual, Definition of the Term "Disability," § 902.4(b). The Fifth Circuit erred in three ways when making this determination.

1. *Extent of Impairment*

First, in evaluating the extent of Mr. Burch's impairment, the Court selected the wrong comparison group to analyze whether his condition was severe enough to set him apart from the average person. The regulatory definition of "substantially limits" requires a comparison between the way an individual with an impairment performs versus the "average person in the general population." 29 C.F.R.

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[10] The term "substantially limits" means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
>
> (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j).

§ 1630.2(j)(1). The Court, however, did not compare Mr. Burch to the average person, but rather to a segment of the population that drinks to the point of inebriation. If this standard were generally adopted, it would require a comparison of the individual with an impairment to others who share the same defining characteristic of that impairment. Thus, for example, a person with a mobility impairment would have to be compared to those in the public who have broken legs and cannot walk temporarily; a person with hemophilia would have to be compared to individuals who are experiencing internal bleeding; an individual with severe depression would have to be compared to individuals who are experiencing temporary depression. This would lead to absurd and unintended results; no one would be able to demonstrate that a condition is substantially limiting because all would be experiencing the exact same effects.

As a factual matter in this case, Mr. Burch's diagnosis distinguishes him from one who abuses alcohol[11] and one who occasionally gets drunk but has no alcohol problem, like the Court's social drinker. Clearly, Mr. Burch is not like the average person, much less every other drinker.

The Court's second error of law was to require, as proof of severity, the existence of secondary impairments beyond alcohol dependence; *i.e.*, permanently altered gait, speech, memory or sleeping disorders. According to physicians who treat alcoholism, these conditions appear very rarely in individuals with alcohol dependence — on the order of 2 out of

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[11] The DSM-III-R criteria for alcohol abuse are (1) a maladaptive pattern of alcohol use indicated by either continued use despite the knowledge of having persistent or recurrent social, occupational, psychological or physical problem that is caused by alcohol use or drinking in hazardous situations; (2) some symptoms have persisted for at least one month or have occurred repeatedly over a longer time period; and (3) never met the criteria for alcohol dependence. National Institute on Alcohol Abuse and Alcoholism, *Alcohol Alert*, No. 30, Washington, D.C. (1987), citing the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised.*

every 1,000 cases — and only in those whose alcoholism has gone untreated for a very long time. Individuals who are employed or employable do not have these conditions. The gait, memory and speech problems result from severe central nervous system damage, due primarily to thiamine deficiency,[12] and are often reversible with treatment. The Court's formulation defines the sickest of the sick and appears to have been taken from the Supplemental Security Income eligibility standards, 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.09, 11.04, 11.14 and 12.02(A)(2) (1997), which are totally inapplicable in ADA cases.

The regulations do not require that an impairment be at its most severe stage, causing secondary impairments. According to the EEOC, the key is whether the impairment "significantly restricts" life activities (EEOC Compliance Manual, § 902.4(c)(1)), not whether it renders the individual completely unable to engage in a life activity. Other Circuit Courts have clearly rejected the Fifth Circuit's standard by finding that individuals with chronic medical conditions meet the definition of disability even when they receive treatment to prevent severe health and other consequences. For example, in *Harris v. H & W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996), the Eleventh Circuit held that a woman with Graves' disease, whose condition was completely controlled by medication, had raised a genuine issue of material fact as to whether she was substantially limited in a major life activity. The Court concluded that the evidence demonstrated that without medication, the woman could suffer numerous severe consequences, including lapsing into coma and death. Proof of what could occur absent mitigating measures was sufficient, rather than evidence that the individual had suffered these consequences. *Id.* at 523. Similarly, the Sixth Circuit held in *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997), that a paramedic whose diabetes was controlled by medication and proper diet had put forward sufficient

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[12] The Court's other condition, long-term insomnia, is not even recognized as a symptom of alcoholism.

evidence to withstand summary judgment, because without medication his condition had caused him to become frustrated, irritable and rude. The Sixth Circuit concluded that this could prevent him from getting along with co-workers, and thereby substantially limit his ability to work. *Id.* at 762-65.

Under the Fifth Circuit's standard, virtually no individual with alcoholism would meet the definition of disability. Even if one did, he or she would not be a "qualified individual with a disability," *i.e.*, able to perform the essential functions of a job either with or without a reasonable accommodation. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). Similarly, individuals with other disabilities would not meet the definition of disability unless their conditions had progressed to the most severe stage. An individual with diabetes would have to experience blindness or organ failure to be protected under the ADA. Congress clearly did not have this in mind in enacting the ADA.

2. *Duration and Impact of Impairment*

Finally, in determining the duration and impact of the impairment, the Fifth Circuit held that the limitations must be "permanent" to be substantially limiting. Other Circuit Courts, the Title I regulations and the EEOC have rejected this legal standard. For example, in *Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996), the First Circuit considered whether a heart condition was of sufficient duration and impact to be substantially limiting. The Court adopted the standard set forth in the EEOC's Compliance Manual,[13] finding

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[13] The Compliance Manual states:

> Although short-term, temporary restrictions generally are not substantially limiting, an impairment *does not necessarily have to be permanent to rise to the level of a disability*. Some conditions may be long-term or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.

(Footnote continued)

that a jury must determine whether the "limitations [on major life activities] were permanent *or persisted on a long-term basis, or that their duration was indefinite and unknowable or expected to be at least several months*." *Id.* at 32 (emphasis added).

The Fifth Circuit's standard is also incompatible with the coverage of chronic conditions that have episodic, active stages. As the EEOC has explained:

> [S]ome chronic conditions may constitute substantially limiting impairments. Such conditions may be substantially limiting when active or may have a high likelihood of recurrence in substantially limiting forms....Some severe back problems and most forms of heart disease and cancer fall into this category. This category also includes illnesses, such as tuberculosis, that may lay dormant for long periods but can reemerge at any time in a substantially limiting manner. Similarly, episodic disorders, such as bipolar disorder, which remit and then intensify also fall into this category.

EEOC Compliance Manual, § 902.4(d). The evidence in this case demonstrates that the active phase of alcoholism for which Mr. Burch sought treatment lasted for over one and one-half years, and that alcoholism itself is a permanent condition that has a life-long impact on Mr. Burch. If Mr. Burch were to begin drinking alcohol again, he would suffer the same debilitating consequences that affected his ability to function.

In sum, the Fifth Circuit's restrictive standard stands in stark contrast to every other Circuit Court decision that has considered whether an individual with alcoholism is disabled under the Rehabilitation Act or ADA. *See* Petitioner's Brief at 17-18. None has required permanent impairments beyond the

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EEOC Compliance Manual, Definition of the Term "Disability," § 902.4(d) (emphasis added).

diagnosis of alcohol dependence. It also conflicts with the policy considerations articulated in 1977 by then-Attorney General Griffen Bell who concluded that alcoholics are "handicapped individuals" within the meaning of the Rehabilitation Act of 1973, as amended.

> [I]t is consistent with Congress' obvious purpose to prohibit discrimination against otherwise qualified individuals solely on the basis of an illness or other handicap to include alcoholism...within the statute's reach. The Supreme Court took note in *Powell v. Texas* of the "shame which we have associated with alcoholism,"...and observed that "the uncharitable attitude of our society toward alcoholics causes many of them to refrain from seeking treatment from any source."

43 Op. Att'y Gen. No. 12 at 12 (1977). Mr. Burch's experience clearly demonstrates that protection against discrimination is as necessary today as it was twenty years ago.

II. THE FIFTH CIRCUIT'S REASONABLE ACCOMMODATION STANDARD CREATES A CONFLICT IN THE CIRCUITS AND IS INCONSISTENT WITH THE TITLE I REGULATIONS

The Fifth Circuit also established a new legal standard for stating a reasonable accommodation claim, which conflicts with the law in at least four other Circuits and with the EEOC regulations and interpretative guidance. Under the Court's formulation, an individual who seeks a reasonable accommodation must demonstrate that the major life activity of working is substantially limited. This standard incorrectly merges the reasonable accommodation obligation with the definition of disability. If the Fifth Circuit's decision stands, a substantial number of people with a broad array of disabilities will be denied accommodations they are entitled to under the ADA.

At least four Circuit Courts have found that an employer has a duty to accommodate an impairment even when it does not limit the activity of working. In *Lyons v. Legal Aid Soc'y*,

68 F.3d 1512 (2d Cir. 1995), for example, a plaintiff who relied on walking devices claimed that her employer failed to accommodate her disability by refusing to provide a parking space near her office. Even though her impairment substantially limited her ability to walk, not to work, the Second Circuit held that plaintiff stated a claim and that the requested accommodation was not unreasonable as a matter of law. *Id.* at 1515. The court held that requiring an employer to provide a qualified person with a disability assistance in getting to work was consistent with Congress' views and those of the EEOC. *Id.* at 1517. The EEOC has included the provision of reserved parking spaces as an example of a possible required accommodation. *Id.* at 1515 (*citing* EEOC Interpretive Guidance at 407).

The First Circuit reached the same conclusion in *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506 (1st Cir. 1996), where a plaintiff whose epilepsy prevented him from driving claimed that his employer failed to accommodate his disability by not providing transportation to work. Though the First Circuit affirmed the district court's denial of plaintiff's claim, it held that employers are not relieved of the duty to accommodate merely because a qualified employee is able to perform a job's essential functions. Rather, employers must provide accommodations "to allow equal enjoyment of employment privileges and benefits or to pursue therapy or treatment." *Id.* at 515, n.9.

The Seventh and Ninth Circuits have reached the same conclusion in both ADA and Rehabilitation Act cases. *See Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959 (7th Cir. 1996); *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992); and *Buckingham v. United States*, 998 F.2d 735 (9th Cir. 1993). *See* discussion in Petitioner's Brief at 23-26.

The *Burch* Court's interpretation also contradicts the plain language of the EEOC's implementing regulations and interpretative guidance. The regulations do not limit reasonable accommodations to those that enable the individual to perform the essential functions of the job (29 C.F.R.

§ 1630.2(o)(ii)), but rather include accommodations "that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(iii). As an example of such an accommodation, the interpretative guidance suggests the "use of accrued paid leave or providing additional unpaid leave for necessary treatment...." App. to 29 C.F.R. § 1630.2(o).

The interpretive guidance further provides that "[i]f an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." App. to 29 C.F.R. § 1630.2(j). Nowhere do the regulations or interpretation provide that this provision only applies to intentional discrimination claims.

The *Burch* court's unprecedented holding rests on the faulty premise that an employer would have nothing to accommodate if the ability to work were not limited. Under this rationale, employers would not need to build ramps, provide accessible toilets, or modify work schedules because such accommodations do not address a work-related impairment. Clearly, the ADA does not limit the reasonable accommodation requirement to individuals with impairments that substantially limit their ability to work.

III. COCA-COLA'S REFUSAL TO PERMIT MR. BURCH TO RETURN TO WORK AFTER A LEAVE OF ABSENCE MAY BE CHALLENGED AS A VIOLATION OF THE REASONABLE ACCOMMODATION REQUIREMENT

For individuals who are alcohol dependent, a leave of absence to obtain treatment is often necessary and, as noted above, is certainly the type of job modification that is contemplated under the ADA. As the Court noted in *Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996), "Treatment would seem to be essential to any accommodation for alcoholism." Yet, the Fifth Circuit's strained formulation of leave,

i.e., coming back to work is not a component of a medical leave, renders this accommodation meaningless. No employee would request a medical leave for any disability, if there were no guarantee that he or she could return to work after treatment.

As a matter of law, nothing in the ADA precludes Mr. Burch from challenging Coca-Cola's refusal to let him return from leave as a violation of the reasonable accommodation requirement. While Coca-Cola's actions may be more easily understood as a discriminatory discharge, that does not mean that Coca-Cola did not also violate its statutory duty to provide a reasonable accommodation. There is no accommodation if the leave is cut short through suspension or discharge. This is no different than a claim against an employer who, when faced with a request for an accommodation, fires the employee instead. In such cases, a reasonable accommodation claim exists. *See e.g.*, *Whitbeck v. Vital Signs, Inc.*, 116 F.3d 588 (D.C. Cir. 1997) (sales representative with a spinal cord tumor whose employer terminated her after refusing her accommodation request to use a motorized cart states a reasonable accommodation claim); *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996) (engineer with renal condition who was discharged after requesting a reasonable accommodation stated a reasonable accommodation claim); and *Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996) (employee's claim that the Postal Service violated its obligation to provide reasonable accommodation, when it refused his transfer request and terminated him, has merit under the Rehabilitation Act).

Similarly, in this case, Mr. Burch is entitled to challenge Coca-Cola's refusal to provide a leave of absence as a violation of the reasonable accommodation requirement.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the decision of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

ELLEN M. WEBER*
SALLY FRIEDMAN
PAUL N. SAMUELS
LEGAL ACTION CENTER
236 Massachusetts Avenue, N.E., Suite 505
Washington, D.C. 20002
(202) 544-5478
Fax: (202) 544-5712

Attorneys for *Amici Curiae*

**Counsel of Record*

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